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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ANGEL GARIBAY,

Defendant and Appellant.

2d Crim. No. B206088  
(Super. Ct. No. 1225885)  
(Santa Barbara County)

Miguel Angel Garibay appeals the judgment entered after a jury convicted him of gross vehicular manslaughter while intoxicated (Pen. Code,<sup>1</sup> § 191.5, subd. (a); count 2), driving under the influence of alcohol causing injury (Veh. Code, § 23153, subd. (a); count 3), driving with a .08 percent blood alcohol level causing injury (Veh. Code, § 23153, subd. (b); count 4), and evading an officer causing death (Veh. Code, § 2800.3, subd. (b); count 5).<sup>2</sup> He was sentenced to 10 years state prison, consisting of the upper term on count 2. The trial court also imposed upper terms on each of the remaining counts. The three-year term on count 3 was ordered to run concurrent to count 2, while the three-year term on count 4 and the 10-year term on count 5 were stayed

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<sup>1</sup> All further undesignated statutory references are to the Penal Code.

<sup>2</sup> Garibay was also charged with second degree murder (§ 187, subd. (a)), but the trial court declared a mistrial as to that count after the jury was unable to reach a verdict.

pursuant to section 654. Garibay contends the court erred in imposing upper term sentences and in denying probation. We affirm.

### FACTS

At approximately 10:30 p.m. on January 20, 2007, Santa Barbara County Sheriff Deputies Michael McNeil, Paul Lie and Geoffrey Roberts had just completed a traffic stop on Santa Maria Way in Santa Maria when they heard the sound of tires "breaking traction" and then saw Garibay driving a truck with its rear end fishtailing. Believing that Garibay was exhibiting speed in violation of Vehicle Code section 23109, subdivision (c), the deputies ran to their patrol cars and began pursuing him. Deputy McNeil, who was in the lead patrol car, followed Garibay onto the northbound 101 freeway as Deputies Lie and Roberts trailed behind. Garibay continued driving above the 65 mile per hour speed limit until he got off the freeway at the Betteravia Road exit. Garibay slowed down as if he were going to stop at the traffic light, then "took off" into the intersection and turned left onto Betteravia Road. Deputy McNeil activated his overhead red and blue lights and siren as he continued his pursuit.

Garibay eventually came to a stop. Deputy McNeil got out of his patrol car, approached Garibay's truck with his weapon drawn, and told Garibay to show his hands and shut off his engine. Garibay did not respond to either command. Instead, he accelerated and sped away. Deputy McNeil ran back to his patrol car as Deputies Roberts and Lie drove past him in pursuit of Garibay with their lights and siren activated. Garibay proceeded at a high rate of speed through a green light at Bradley, then ran red lights at the next three intersections. As he ran through the third red light at the intersection of West Betteravia and Broadway, he collided with a truck driven by Brandon Harper and then struck a vehicle driven by Sandra Gonzalez. Harper suffered catastrophic head injuries and was pronounced dead at the scene. Gonzalez was taken by ambulance to the hospital, where she was treated for injuries that resulted in her missing two and a half months of work.

Deputy Roberts approached Garibay's truck, which was upside down on its roof. Garibay, whose injuries were relatively minor, complied with the deputy's demand to show his hands. He said he was "sorry." The paramedic who transported Garibay to the hospital smelled alcohol on his breath. It was determined that Garibay had a .13 percent blood alcohol level one hour after the collision. The criminalist who analyzed Garibay's blood concluded that his blood alcohol level would have been closer to .15 percent at the time of the accident.

Santa Maria Police Officer Jesse Silva interviewed Garibay at the hospital approximately one hour after the collision. After waiving his *Miranda*<sup>3</sup> rights, Garibay told the officer he had only consumed three cups of beer that afternoon and that the accident occurred as he was driving back to a party where he had been "jumped" earlier that night. While he initially said he did not look at the traffic light when he drove through the intersection where the collision occurred, he later insisted that the light was green. He also admitted that he was driving approximately 60 miles per hour when he entered the intersection.

Corporal Jesus Valle of the Santa Maria Police Department investigated the accident and determined that Garibay was driving a minimum of 61 miles per hour, while Harper and Gonzalez were driving within the posted speed limit. He also concluded that the traffic light was red when Garibay entered the intersection. A witness to the accident testified that Garibay appeared to be driving almost 100 miles per hour when he ran a red light and collided with Harper's truck. An engineer who testified on Garibay's behalf acknowledged that Garibay was travelling at least 52 miles per hour at the moment of impact.

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<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

## DISCUSSION

### *Selection of Upper Terms*

Garibay contends the trial court violated his right to a jury trial under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), by imposing upper terms based on facts that were neither admitted nor found true by the jury. This claim is easily disposed of because Garibay was not sentenced under the version of section 1170, subdivision (b) that was struck down as unconstitutional in *Cunningham*. On March 30, 2007, the statute was amended to provide that the trial court has discretion to impose the upper term without engaging in any additional factfinding. (Stats. 2007, ch. 3, § 3.) Less than two months later, our Supreme Court judicially reformed the former law to comply with the amended version. (*People v. Sandoval* (2007) 41 Cal.4th 825, 857.) Garibay was sentenced on February 14, 2008. Accordingly, his reliance on *Cunningham* is unavailing.<sup>4</sup>

Garibay also fails to meet his burden of showing that the court abused its discretion in imposing upper term sentences. While the court was required to specify its reasons for imposing upper terms, it was not compelled to cite any facts supporting its decision or weigh aggravating and mitigating circumstances. (*People v. Sandoval, supra*, 41 Cal.4th at p. 847.) In any event, Garibay fails to undermine the presumption that the court considered the mitigating factors he identified in his sentencing memorandum. (See *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1317-1318.) The court expressly acknowledged that it had considered the facts of the case and all of the sentencing factors in determining that upper terms were warranted. The court reasoned that Garibay's actions were "selfish, cowardly [and] callous" in that he had led the police on a high-speed chase after driving recklessly, "not caring whether he goes through red lights, green

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<sup>4</sup> Garibay contends that our Supreme Court erred in concluding that retroactive application of the amended version of section 1170, subdivision (b), does not violate ex post facto principles. (See *People v. Sandoval, supra*, 41 Cal.4th at pp. 853-857.) He acknowledges, however, that we have no authority to disregard that conclusion. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

lights, just wants to get away because he is concerned about his own safety, he doesn't care about anybody else . . . ." The statement is plainly sufficient to establish the aggravating circumstance that Garibay's actions disclosed a high degree of callousness. (Cal. Rules of Court, rule 4.421(a)(1).) Garibay acknowledges that his prior unsatisfactory performance on probation was another aggravating circumstance that the court could consider in deciding to impose the upper term. (Cal. Rules of Court, rule 4.421(b)(5).) He also acknowledges that the existence of a single aggravating factor is sufficient to support the imposition of upper terms. (*People v. Yim* (2007) 152 Cal.App.4th 366, 369.)

### *Denial of Probation*

Garibay asserts that the court's decision to impose upper terms and deny probation was an abuse of discretion and amounted to a denial of his due process rights. This claim is necessarily disposed of by our conclusion that the court did not abuse its discretion in imposing upper term sentences. In any event, he fails to meet his heavy burden of proving that the court abused its discretion in denying probation. (See *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1530-1531.) To the extent Garibay asserts that the court relied on erroneous evidence, improperly relied on facts that were elements of the charged offenses, or failed to consider mitigating factors in denying probation, he fails to show a reasonable probability that the court would have reached a different conclusion in the absence of any of these alleged errors. (*People v. Weaver, supra*, 149 Cal.App.4th at pp. 1318-1319.)<sup>5</sup>

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<sup>5</sup> Garibay requests judicial notice of a map showing that the driving distance from the location where Deputy McNeil activated his emergency lights and siren to the intersection where the collision occurred is 1.1 miles. Garibay offers this evidence to disprove the probation report's circumstance in aggravation that the deputies pursued Garibay for more than five miles, which the court purportedly relied on in its statement that the pursuit "lasted for some distance." According to Garibay, it was improper "to include the distance on the freeway where officers followed appellant, but did not order him to pull over." We conclude otherwise. Deputy McNeil testified that he was "attempt[ing] to overtake" Garibay's truck while he was following him on the freeway and that Garibay kept "gaining space" on him by driving at a high rate of speed. Accordingly, Garibay's request for judicial notice is denied.

The judgment is affirmed.  
NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Edward H. Bullard, Judge  
Superior Court County of Santa Barbara

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